83-4

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES BLAIR PORTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, James Blair Porter, Jr., requests that a writ of certiorari issue to review the March 10, 1983, opinion of the United States Court of Appeals for the Sixth Circuit, Cininnati, Ohio (Docket #81-5617), affirming the judgment of conviction of the petitioner by the United States District Court for the Western District of Tennessee, Memphis, Tennessee, the Honorable Harry W. Wellford presiding.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT'S FAILURE TO EITHER DISMISS THE INDICTMENT OR ALLOW THE PETITIONER TO EXAMINE THE RADAR AND INFRARED EQUIPMENT ABOARD THE PLANE WAS IN VIOLATION OF THE CLASSIFIED INFORMATION PROCEDURES ACT AND DENIED HIM DUE PROCESS OF LAW AND A FAIR TRIAL. AS WELL AS HIS RIGHTS OF CONFRONTATION AND EFFECTIVE ASSISTANCE OF COUNSEL

II.

THE SEARCH OF THE AIRPORT HANGAR IN WEST HELENA WAS CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT

A. The Petitioner was Entitled to Fourth Amendment Protection since he had a Reasonable Expectation of Privacy in the Hangar

B. The Substantive Provisions of the Fourth Amendment were Violated

I N D E X

II.

C A S E S

S T A T U T E S

RULES

AMENDMENTS

ARTICLES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, No. 81-5617, March 10, 1983, is reported as United States v. Porter, 701 F.2d 1158 (6th Cir. 1983). A copy of said opinion is attached and hereby incorporated by reference as Appendix I.

JURISDICTION

On March 10, 1983, the United States Court of Appeals for the Sixth Circuit in cause number 81-5617 affirmed the petitioner's judgment of conviction by the United States District Court for the Western District of Tennessee, Memphis, Tennessee. On March 23, 1983, the petitioner filed a petition for rehearing and suggestion for rehearing en banc. On May 3, 1983, the Sixth Circuit Court of Appeals denied said petition for rehearing. Said order is attached hereto and hereby incorporated by this reference as Appendix II.

On April 22, 1983, the District Court stayed the imposition of the petitioner's sentence until after he exhausted his appellate remedies. On May 18, 1983, and again on June 22, 1983, the United States Court of Appeals for the Sixth Circuit stayed the issuance of the mandate affirming the petitioner's judgment of conviction and sentence pending this petition for writ of certiorari.

The petitioner submits that Title 28, United States Code §1254(1) confers jurisdiction on this Court. Jurisdiction is further based on Rule 17(1)(c), Supreme Court Rules, because the United States Court of Appeals for the Sixth Circuit has:

> "(c). . . decided an important question of federal law which has not been, but should be, settled by this Court, . . . (and). . . decided a federal question in a way in conflict with applicable decisions of this Court."

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT'S FAILURE TO EITHER DISMISS THE INDICTMENT OR ALLOW THE PETITIONER TO EXAMINE THE RADAR AND INFRARED EQUIPMENT ABOARD THE PLANE WAS IN VIOLATION OF THE CLASSIFIED INFORMATION PROCEDURES ACT AND DENIED HIM DUE PROCESS OF LAW AND A FAIR TRIAL. AS WELL AS HIS RIGHTS OF CONFRONTATION AND EFFECTIVE ASSISTANCE OF COUNSEL?

II.

WHETHER THE SEARCH OF THE AIRPORT HANGAR IN WEST HELENA WAS CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part, that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or afffirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 18 United States Code, App. III, provides in pertinent part, that:

> "6(a) Motion for hearing.-Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be

made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.-(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a) of this section, the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.-(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order -

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be

held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings.-If at the close of an in camera hearing under this Act (or any portion or a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure-(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) of this section and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified

information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of the classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to-

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or;

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue."

Title 21 United States Code, §841(a)(1)

provides, in pertinent part, that:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

Title 21, United States Code, §846

provides, in pertinent part, that:

> "Ay person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 21, United States Code, §952

provides, in pertinent part, that:

> "(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, . . ."

Title 21, United States Code, §963

provides, in pertinent part, that:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 28, United States Code, §1254(1)

provides, in pertinent part, that:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28, United States Code, §1291

provides, in pertinent part, that:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, United States Code, §1294, provides in pertinent part, that:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
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> (1) From a district court of the United States to the court of appeals for the circuit enbracing the district;"

Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure provides as follows:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial or were obtained from or belong to the defendant."

Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> "(1) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court

may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal."

Rule 41(a) of the Federal Rules of Criminal Procedure provides as follows:

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government."

STATEMENT OF THE CASE

[The District Court Clerk's Record on Appeal will be referred to as "C.R."; The Reporter's Transcript of the District Court Motion to Suppress Proceedings, held May 4-6, 1981, shall be referred to as "R.T. May _____ at _____". The Reporter's Transcript of the District Court trial shall be referred to as "R.T. June _____, at _____".]

A. District Court Proceedings:

On February 10, 1981, a two (2) count indictment was returned against the petitioner charging him with the crimes of conspiracy to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §841(a)(1) and §846; and conspiracy to unlawfully import marijuana into the United States, in violation of Title 21 U.S.C. §952 and §963. Kenneth Wayne Taylor and Gary Dennis Brickey were alleged co-conspirators also charged in both counts of the indictment. (Indictment, C.R. 1)

On March 23, 1981, the petitioner filed several pre-trial motions including: a motion for the production of exculpatory evidence, a motion for discovery and inspection, and a motion to suppress physical evidence and the "fruits" thereof. (Motions, C.R. 12, 14, 23, and 24).

On March 25, 1981, the petitioner filed a motion to continue the hearing date for the motions set forth above as well as the trial

date alleging inter alia that he and his experts were entitled to personally examine the scientific tracking equipment, i.e., the forward looking infrared and radar equipment, aboard the Customs' jet aircraft. (Motion, C.R. 49).

On May 4, 5 and 6 of 1981, an evidentiary hearing was held on these matters. On May 27, 1981, the District Court denied said motions. (Order on motions to suppress, C.R. 66).

On May 27, 1981, counsel for petitioner filed a motion to continue the trial date of June 1, 1981, because the government refused to allow him to inspect the specially-equipped Customs' jet aircraft used to follow the suspect aircraft into the United States. The Customs' aircraft was allegedly equipped with infrared and special radar equipment and petitioner's attorney requested that the trial be continued to allow him and defense

experts to examine said equipment. (Motion for continuance, C.R. 67).

Said motion to continue was denied by the District Court on May 29, 1981. (Minutes of hearing of May 29, 1981).

On June 1, 1981, the petitioner's jury trial began and on June 10, 1981, the petitioner and the co-defendants were found guilty by the jury of both counts of the indictment. (Order on jury verdicts, C.R. 72).

On August 5, 1981, the petitioner appeared for sentencing before the Honorable Harry W. Wellford. He was adjudged guilty of Counts One and Two of the indictment and committed to the custody of the Attorney General for a period of five (5) years on each of Counts One and Two, concurrently, and fined the sum of $7,500 on each of Counts One and Two, for a total fine in the amount of $15,000. (Judgment and commitment, C.R. 78).

A timely notice of appeal was filed by the petitioner pursuant to Title 28, U.S.C.

§1291 and §1294. (Notice of appeal, C.R. 82).

On August 17, 1981, the District Court Judge allowed the petitioner to remain free on bond pending appellate review. (Order, C.R. 88).

On March 10, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the petitioner's conviction in an opinion attached hereto as Appendix I.

On May 3, 1983, the United States Court of Appeals for the Sixth Circuit denied the petitioner's petition for rehearing in an Order attached hereto as Appendix II.

On May 18, 1983, and again on June 22, 1983, the United States Court of Appeals for the Sixth Circuit stayed the issuance of the mandate affirming the petitioner's judgment of conviction and sentence pending this petition for writ of certiorari.

B. STATEMENT OF THE FACTS

On January 26, 1981, at approximately 10:30 p.m. (E.S.T.) over international waters off the coast of Florida, approximately fifty (50) miles from Bimini, Bahamas, a United States Customs Service jet aircraft equipped with forward-looking infrared equipment (FLIR) and air-to-air radar picked up a "target" on said equipment. (R.T. May 5, at 163-164).

The infrared equipment indicated that the "suspect" aircraft was a low-wing, twin-engine aircraft, flying approximately 500 feet above the ocean without its navigational lights on. (R.T. May 5, at 167).

The Customs agents testified that the infrared equipment aboard their aircraft indicated that the suspect aircraft was a

low-wing, twin-engine aircraft.[1] They were not able to determine this by their personal vision. (R.T. May 5, at 162-164).

Shortly after reaching United States territory, the "target" plane was observed to increase its altitude to a normal height and its navigational lights were turned on. (R.T. May 5, at 283). The Customs' jet followed this aircraft northward over Florida, Georgia, and Alabama. (R.T. May 5, at 167).

The Customs' jet aircraft tracked the "suspect" aircraft constantly up to a point

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1/ Testimony at the pre-trial hearing and at the trial revealed that the FLIR system allows a person to see particular objects in the dark by picking up the heat emitted from those objects and transposing the image of the object through a camera-like device onto a screen, similar to that on a black and white television set. The system allows one to make a generic identification of the object. For example, the operator is able to distinguish between people and other objects, or a Cesna Citation and a D.C.-3 but not between two different D.C.-3's. (See e.g., R.T. May 5, at 194). See also, United States v. Kilgus, 571, F.2d 508, 509 (9th Cir. 1978).

over Alabama when deicing equipment was utilized causing the aircraft's power system to automatically cut-off the power to the air-to-air radar. (R.T. June 1, at 128-129, 149-150).

After reacquiring power, the radar then picked up a target assumed to be the same suspect aircraft previously followed by the Customs' plane. This second "suspect" plane was followed until it was also lost over the Holly Springs area of Mississippi. (R.T. May 5, at 243, 280).

The infrared equipment aboard the Customs' aircraft was not operating over Alabama into Mississippi due to adverse weather conditions. (R.T. May 5, at 280).

The Customs agents aboard the Customs Service jet aircraft testified that the infrared equipment did not function as they approached the Holly Springs area due to weather conditions. (R.T. May 5, at 206). They tracked the suspect aircraft with radar but lost the target as it descended due to

its low altitude and low air speed when it disappeared right above the ground. (R.T. May 5, at 208). Due to the Cesna jet being low on fuel, they were not able to follow the suspect plane and the Customs' aircraft went to Memphis where it refueled. (R.T. May 5, at 171).

The Holly Springs, Mississippi police were alerted and two officers proceeded to the Holly Springs airport, arriving some time after 2:20 a.m. on the morning of January 27th. Upon their arrival they observed a twin-engine plane taking off and heading in a western direction. A pick-up truck was observed parked in an airport area that normally is locked and closed during night hours. The police searched the inside of the truck and found bolt cutters, suitcases, fuel tanks, aircraft radio equipment and flight logs. In the meantime, the Sheriff's Department had been alerted and a Deputy Sheriff arrived at the airport shortly after the Holly Springs police. He testified that

a search of the area was carried out, revealing that the lock at the airport entrance had been cut.

Some time after the suspect aircraft left the Holly Springs area, the Memphis area control center notified Customs that a possible target had been picked up headed toward Helena, Arkansas. A second group of Customs agents flying in a Beachcraft King Air, which was not equipped with the special equipment aboard the Customs' jet and which previously had been involved in following the suspect aircraft, was directed to the target plane headed toward the Helena, Arkansas airport. The pilot of this Customs' plane was able to make a visual identification of the suspect aircraft as a twin-engine Piper Navajo with a "bright" tail light similar to the one he had noticed on the plane that entered the United States from international

waters off the coast of Florda.[2] The target plane landed at the West Helena airport. The Customs' plane landed shortly thereafter and attempted to block off a departure route and to intercept the target plane. The suspect plane took off at a low altitude without navigational lights. By this time, the specially-equipped Customs' jet had been directed toward the area and again locked-on the fleeing suspect aircraft. It was proceeding at a low altitude without lights in a northward direction and was observed in darkness about 4:00 a.m. to land at the Forrest City, Arkansas Airport.

Through means of the special infrared equipment, the suspect plane was observed to come to a stop, turn around, and two persons emerged for a short time. An object was

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2/ A stipulation was introduced at the trial in this matter that the suspect aircraft had a normal electrical lighting system and the tail light was not "bright".

observed to be left near the runway and the Navajo plane took off. Shortly thereafter, a fifty (50) pound bundle of marijuana was picked up at the scene by local police.

The suspect plane then proceeded to the Arlington Airport in Tennessee, where it landed and the petitioner Porter and co-defendant Matthews were arrested. Co-defendant Brickey was arrested by a deputy sheriff at the Holly Springs Airport in the area surrounding the pick-up truck that was found there.

On January 28th, local police in West Helena obtained a search warrant for a hangar at the West Helena Airport, where they discovered missing Navajo airplane seats and marijuana residue. (Order on motions to suppress, R.T. 66-70; Opinion of the United States Court of Appeals in United States v. Porter, supra.)

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT'S FAILURE TO EITHER DISMISS THE INDICTMENT OR ALLOW THE PETITIONER TO EXAMINE THE RADAR AND INFRARED EQUIPMENT ABOARD THE PLANE WAS IN VIOLATION OF THE CLASSIFIED INFORMATION PROCEDURES ACT AND DENIED HIM DUE PROCESS OF LAW AND A FAIR TRIAL, AS WELL AS HIS RIGHTS OF CONFRONTATION AND EFFECTIVE ASSISTANCE OF COUNSEL

The conclusion that the aircraft near which the petitioner was arrested in Tennessee was the same aircraft observed by Customs agents entering the United States as well as the conclusion that the same aircraft dropped off a bundle of marijuana in Forrest City, Arkansas, was not based upon actual visual observations of the Customs agents. These conclusions were based upon observations from infrared equipment and radar equipment aboard the Customs' jet. Aboard the Customs' Cesna Citation jet aircraft was an air-to-air radar system, manufactured by Westinghouse and normally installed aboard Air Force F-16 fighter aircraft, and a

forward-looking infrared (FLIR) system, manufactured by Texas Instruments. The FLIR picks up infrared radiation given off by objects and projects the image on a black and white T.V.-type screen. This equipment picks up the heat radiated by an object and works without light. The radar system is an allegedly classified and sophisticated radar system whose computer tracking system has the ability to "lock-on" to a target and "look down" to pick that target out. As stated above, without this equipment there certainly was no probable cause for the arrest of the petitioner. (R.T. May 5, at 163, 193-194). It is also clear that this equipment and its abilities constituted the basis for the petitioner's conviction as it provided the nexus between the petitioner and the marijuana.

In this context, it is important to remember that the Customs agent testified that at the Forrest City Airport he did not

actually see anything with his own eyes as he was in an aircraft 1000 feet above the ground and it was pitch black outside. All his observations about activity on the ground were made with the infrared equipment. (R.T. June 1, at 166).

In evaluating this infrared and radar equipment, it is important to realize that the same equipment was severely criticized in United States v. Kilgus, 571 F.2d 508 (9th Cir. 1978), which is factually similar to this situation. In Kilgus, a Customs' plane equipped with a FLIR system followed a suspect plane. The Court held the FLIR "observations" were not enough to convict the defendant therein. As stated above, there was a break in the continuity of the FLIR observations of the plane in the petitioner's case. The Court in Kilgus, supra at 510, n.2, held this break in the continuity would prevent the admission of the FLIR testimony against the petitioner.

The petitioner's attorney made numerous pretrial and trial requests to examine the equipment. On May 6, 1981, the petitioner's attorney orally renewed a motion to board the Customs' aircraft with experts to examine the infrared and radar equipment. (R.T. May 6, at 608). The U.S. Attorney objected on the basis that the material was classified. (R.T. May 6, at 610). The District Court ordered the U.S. Attorney to communicate in writing with the appropriate authorities and obtain their position on the request. (Order, R.T. May 6, at 610).

On May 29, 1981, the U.S. Attorney appeared in Court and announced that he had asked the Commissioner of Customs if it would be possible for the petitioner's attorney and experts to examine the equipment. The U.S. Attorney indicated that he had received a reply indicating that the radar equipment on board the Citation was classified as secret. The FLIR was not mentioned. (R.T. May 29, at 3-4). The District Court upheld the

government objection and denied the defense request. (R.T. May 29, at 14). At trial, the petitioner renewed his request and objected to testimony concerning the radar and infrared equipment. The District Judge denied the request and overruled the objection. (R.T. June 1, at 112-114).

On October 15, 1980, Congress enacted the Classified Information Procedures Act, Pub. L. 96-456, 94 Stat. 2025, 18 U.S.C. App. III (1980), hereinafter referred to as the "Act". The purpose of the Act is to provide certain pretrial, trial and appellate procedures in criminal cases involving classified information.

In United States v. Jolliff, 548 F.Supp. 229, 230 (D.Md 1981), the District Court held that the procedures set forth in the Act must be followed in a criminal case which involves classified information. In the case-at-bar, the District Court did not follow the procedures set forth in the Act.

The petitioner made a specific request under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1970), to inspect the equipment on board the Customs' aircraft. The request was also made pursuant to the petitioner's Fifth and Sixth Amendment Rights under the Constitution. The government's only response was that the radar was classified. They submitted no evidence showing that the infrared equipment was classified; consequently, there was no basis on which to deny the petitioner access to that equipment. Their only evidence that the radar was classified was a telegram from the Director of Customs, not an affidavit from the Attorney General, which is required by the Act.

The Act, was enacted after the development of what became known as the "greymail" problem, i.e., in order to protect the national security, the government had to dismiss prosecutions against defendants who might reveal classified information in the

course of a public trial. These greymail cases led to hearings by the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence and by the Subcomittee on Legislation of the House Permanent Select Committee on Intelligence. These hearings resulted in legislative proposals by the Senate, the House, and the Carter Administration. The thrust of these proposals was to create a procedural mechanism for restricting a defendant's access to national security information so as to avoid public disclosure during a trial. The end product resulted in the enactment of the Act.[3]

Perhaps because of the newness of this legislation or the paucity of prosecutions involving classified information, both case law and treatise discussion of the Act have been scarce.

3/ Menkhaus, Greymail: Constitutional Immunity from Justice, Volume 18: 2 Harv. J. Legis. 388 (1981).

In United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980), the defense filed a request under Brady v. Maryland, supra, and United States v. Agurs, supra, requesting that the government search records of the C.I.A., F.B.I. and military intelligence organizations for materials relating to anti-Castro activities of the defendants. The defendants claimed that the information would have a direct and immediate bearing on whether funds going into and out of Caribbean Cargo accounts were monies required to report to the Internal Revenue Service.

The Court held that if the C.I.A. did not make the file available for an in camera inspection, all charges relating to the Caribbean Cargo accounts must be dismissed. /4 The Court mentioned in a footnote that under the recently enacted Classified Information Procedures Act when the defendant is

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4/ United States v. Diaz-Munoz, supra at 1333.

prevented under the procedures of the Act from disclosing or causing disclosure of classified information, the Court

> "shall dismiss the indictment unless it determines that such dismissal would not be in the interest of justice. In lieu of dismissing the indictment the court may dismiss specific counts or find against the United States on the issue."/5

The Court concluded that it was error for the trial court not to undertake an examination of the file in camera. This holding is clearly analogous to the case-at-bar in that the District Court could have examined the equipment with the assistance of government agents without revealing same to the defense attorneys if the Court concluded that it was not necessary. Surely, Due Process requires at a minimum this in camera inspection of the equipment in question. Obviously, the District Judge could have gone to the airport to conduct this inspection.

5/ Id. at 1334. n.2

In United States v. Jolliff, supra, the Court upheld a broad attack upon the constitutionality of the Act. Section 6 of the Act provides that upon the government's request, the trial court shall hold a hearing to determine the use, relevance and admissability of classified information. If the Attorney General certifies that an open proceeding would reveal classified information to the public, this hearing is to be held in camera with both parties present. In the case-at-bar, the United States Attorney's Office alleged that classified information was involved, so the procedures of the Classified Information Procedure Act were mandatory. United States v. Jolliff, supra.

It is clear that §6(c)(2) of the Act provides that before the information can be treated as classified, an affidavit must be submitted from the United States Attorney General certifying that the information is classified. Because this was not done in

this case, the Act and its procedures were not followed. The petitioner and his experts were entitled to inspect the equipment. Refusal of this request should have resulted in a dismissal of the charges against the petitioner.

The in camera hearing authorized by the Act is not new. Under Rule 16(d)(1) of the Federal Rules of Criminal Procedure, the Court, after an ex parte, in camera hearing, may authorize the government to withhold classified information from a defendant's discovery request. The language of the rule itself permits the Court to order that discovery be "denied, restricted or deferred, or [to] make such other order as is appropriate." Further, the comments of the advisory committee with respect to Rule 16(d) clearly indicate that the authority now explicitly granted by §4 of the Act was intended to have been granted by the existing

Rule 16(d).[6] At least one commentator[7] has argued that the Act's proposal for an *in camera*, *ex parte* hearing may be unconstitutional in light of this Court's holding in *Alderman v. United States*, 394 U.S. 165 (1969), wherein the government sought to withhold certain surveillance records from the defendants because none of the information obtained from such record was even arguably relevant. The government conceded that some of the material contained no threat of injury to the public interest or national security, but argued it would be hard to distinguish that which threatened from that which did not. *Id* at 181 n. 13. Significantly, the government offered to have the trial judge determine the initial

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6/ Advisory committee notes on amendments to the Federal Rules of Criminal Procedure, 39 F.R.D. 69, 178 (1966)

7/ Menkhaus, *supra*.

question of relevance in an ex parte, in camera setting. In rejecting this proposal, the Court held as follows:

> "Although this may appear a modest proposal, especially since the standard for disclosure would be 'arguable' relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened in camera by the trial judge. Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance."
> Alderman v. United States, supra at 182.

Although the Court in Alderman did not ground its holding in any constitutional language, it is at least arguable that the ex parte procedure rejected there, like the ex parte procedures proposed in the Act, violate the defendant's right to a fair trial by denying him the effective assistance of

counsel.[8] Further, the strong language used by this Court in Davis v. Alaska, 415 U.S. 308 (1974), in holding that a defendant's constitutional rights of confrontation cannot be impaired even by a legitimate governmental interest reflects that the Act may be an unconstitutional denial of a defendant's right of confrontation.

However, this Court has previously authorized ex parte, in camera examinations. See e.g., Goldberg v. United States, 425 U.S. 94 (1976) (disclosure of Jencks material); United States v. Nixon, 418 U.S. 683 (1974) (disclosure of material allegedly containing confidential presidential communications).

Cf., United States v. Boyce, 594 F.2d 1246, 1252 (9th Cir. 1979), cert. denied, 444 U.S. 855 (1979), which was a prosecution for selling top secret information prior to the

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8/ United States v. Joliff, supra, rejected this argument.

passage of the Act. The Ninth Circuit held that the secret information was properly examined in camera by the District Judge for possible exculpatory evidence. The materials were sealed by the District Court and ultimately also examined by the Ninth Circuit for possible exculpatory evidence.

In his concurring opinion in California v. Green, 399 U.S. 149 (1970), Mr. Justice Harlan stated that the Confrontation Clause requires only that the prosecution produce available witnesses; however, the Due Process Clause bars conviction "where the critical issues at trial were supported only by ex parte testimony not subjected to cross examination, and not found to be reliable by the trial judge." Id. at 186, n.20. It is obvious that since the petitioner was denied access to the equipment aboard the Customs' jet, he was denied his right to confront and effectively cross examine the Customs agents. Mr. Justice Harlan's words are clearly analogous to the petitioner in that the

testimony of the agents was not effectively cross examined due to this refusal of the trial judge. In McMann v. Richardson, 397 U.S. 759 (1970), this Court held that the Sixth Amendment requires that persons accused of crimes be represented by reasonably competent and effective counsel. Clearly, the petitioner's counsel was not able to effectively cross examine the witnesses against him due to the trial court's ruling. Thus, the petitioner was denied his right to the effective assistance of counsel.

In addition to the matters discussed above requiring that the petitioner have access to the alleged secret equipment, Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure required the government to allow the petitioner to inspect this alleged secret equipment aboard the Customs' jet. Failure to comply with this rule denied the petitioner his Fifth and Sixth Amendment rights.

In its opinion, the Sixth Circuit Court of Appeals held that the District Court did not abuse its discretion in failing to dismiss the indictment because of a violations of Rule 16(a)(1)(c), supra, and the Classified Information Procedures Act. The Court held as follows:

> "[w]e conclude that even if the defendants may have been hampered to some degree by inability to inspect the surveillance equipment in their defense against the charge of the conspiracy to import a controlled substance, they were not deprived of a fair trial. Nor did the denial of discovery taint the trial as a whole to the extent that it rose to the level of a constitutional deprivation." United States v. Porter, supra, at 7.

Since the petitioner was denied the Fifth and Sixth Amendment rights set forth above, the Sixth Circuit Court of Appeals was clearly erroneous in holding that at most this was harmless error. Chapman v. California, 386 U.S. 18 (1967). See also, Davis v. Alaska, supra.

In addition, it is respectfully submitted that it is of paramount national importance that this Court delineate the procedures, requirements and constitutionality of the Classified Information Procedures Act due to the importance of cases involving national security vis-a-vis the constitutional rights of an accused in a classified information criminal case.

II.

THE SEARCH OF THE AIRPORT HANGAR IN WEST HELENA WAS CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT

A. The Petitioner was Entitled to Fourth Amendment Protection since he had a Reasonable Expectation of Privacy in the Hangar

This Court has set down a two-part inquiry to be applied in determining whether or not the Fourth Amendment's mandate that individuals "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" has been violated. First, it must be determined whether or not the individual claiming the

violation is even entitled to Fourth Amendment protection in the given situation by virtue of an "expectation of privacy" in the premises or things searched. If the answer to this first inquiry is in the affirmative, the individual must then establish that the search complained of violated the substantive provisions of that amendment. See Rawlings v. Kentucky, 448 U.S. 98 (1980), Rakas v. Illinois, 439 U.S. 128 (1978).

Although what constitutes a sufficient "expectation of privacy" under Katz v. United States, 389 U.S. 347 (1967), and its progeny is at times hazy, under the guidelines set forth in Rawlings v. Kentucky, supra, and Rakas v. Illinois, supra, the petitioner had a sufficient privacy interest in the hangar to claim Fourth Amendment protection and the Sixth Circuit Court of Appeals was in error in reversing the trial court's ruling to this effect.

Rawlings discusses several factors which must be considered in making this determination, the most important ones being the ability to control the access to the objects or premises searched and the subjective expectation of privacy held by the person claiming Fourth Amendment protection. In Rawlings, the defendant had given some narcotics to a recent acquaintance for safe keeping in the latter's purse, which was subsequently searched by police and the narcotics seized. In finding that the defendant had no reasonable expectation of privacy in the acquaintance's purse, the Court noted that he had no power to control or exclude access of others to the purse; any expectation of privacy in the purse would have been further unreasonable in light of the fact that it could only have been based on the defendant's faith in the acquaintance's desire and ability to control access to the purse, said faith being unjustified due to the "precipitous nature"

of the bailment and relationship between the individuals; and the defendant did not have any actual subjective expectation of freedom from intrusion in the purse. Rawlings, supra at 104-106.

This factual scenario is in no way similar to the circumstances surrounding the petitioner's involvement with the hangar in West Helena. The petitioner had the owner's permission to use the hangar and was not occupying the premises illegally. The petitioner had a subjective expectation of privacy which was more than adequately justified by the undisputed fact that he had placed a lock on the hangar door and had not given anyone else the key. In other words, at the time of the search, only the petitioner had access to the area searched; anyone else attempting to gain entry had to break the lock to do so, and this is in fact exactly what Agent Lawrence testified was necessary in order to search the hangar. (R.T. May 4, at 44).

It is submitted that under these circumstances it is incomprehensible that anyone could seriously maintain that the petitioner did not have a reasonable expectation of privacy in the hangar. It is difficult to perceive how an individual might more adequately ensure his privacy than by placing his possessions in a storage area which he has permission to use and to securely lock that area, being sure not to give the key to the lock to anyone else. Put another way, if the Fourth Amendment does not protect a person's privacy in this situation, any protection which it does provide to our citizens is not at all apparent to the petitioner or his counsel.

In its opinion, the Sixth Circuit Court of Appeals relied upon Rawlings supra, and upon United States v. Barry, 673 F.2d 912 (6th Cir. 1982), in making its determination that no interest of the petitioner which the Fourth Amendment was designed to protect was infringed by the hangar search. As discussed

above, Rawlings involved a very different set of facts and provides no support for the Court of Appeals' ruling. Similarly, United States v. Barry involved a situation (not unlike the one in Rawlings) which is not at all applicable to the present case. In Barry, the defendant attempted to suppress evidence consisting of methaqualone tablets seized by the government. The pills had been shipped to the defendant via Federal Express and were discovered by company employees before the defendant could pick them up when the package became damaged. Federal Express then notified the authorities.

The Court in Barry, supra, at 919, pointed out that the defendant had no reasonable expectation of privacy while the drugs were in Federal Express' possession, since he could not expect that the package would not be opened by the company for any number of reasons, including damage to the package, and he could not expect that the company would not turn the contraband over to

the authorities upon its discovery. In addition, the defendant had made little attempt "to protect his privacy interest from the risk of exposure inherent in his bailment", and for these reasons had no reasonable expectation of privacy in the parcel. Id.

As in Rawlings, the factual situation involved in Barry in no way resembles the petitioner's situation. It is once again urged that neither Barry nor Rawlings nor any other case which the petitioner has been able to uncover provides support for the notion that an individual has no protectable Fourth Amendment privacy interest in items which he has locked within a storage area to which no one but himself has a key. If this Court does not overturn the Sixth Circuit's ruling in this matter, a precedent will have been estabished which effectively strips the Fourth Amendment of any real value as a

shield against governmental intrusion into the private areas and effects of its citizens.

B. The Substantive Provisions of the Fourth Amendment were Violated

1. The Search Warrant was Issued by a Judge Without Authority to Issue it

Where a search is federal in character, the legality of the search should be analyzed in light of federal constitutional requirements and the provisions of Rule 41 of the Federal Rules of Criminal Procedure. United States v. Crawford, 657 F.2d 1041 (9th Cir. 1981), Navarro v. United States, 400 F.2d 315 (5th Cir. 1968). Rule 41 is applicable even when the searches are executed under state warrants and in cooperation with state officers. United States v. Crawford, supra, United States v. Redlick, 581 F.2d 225 (9th Cir. 1978), United States v. Burke, 517 F.2d 377 (2nd Cir. 1975).

The question of whether or not a search is federal in character has been considered by this Court in Byars v. United States, 273 U.S. 28 (1927), and Lustig v. United States, 338 U.S. 74 (1949). Discussing Byars, Justice Frankfurter stated in Lustig that:

> "[t]he crux of the doctrine is that a search is a search by a federal official if he had a hand in it . . . It is immmaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." 338 U.S. at 78-79.

Under this analysis and the later federal cases elaborating on it, the search of the hangar in West Helena was without question a federal search despite the fact that a state search warrant was involved. See United States v. Crawford, supra, United States v. Sellers, 483 F.2d 37 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974). A federal agent initiated the investigation leading to the issuance of the warrant, the investigation arose out of circumstances

uncovered by Federal Customs agents during pursuit of petitioner from Florida, and the evidence was to be used in the federal prosecution which ensued involving violation of a federal narcotics statute. In fact, there was virtually no state involvement at all other than the presence of a state police officer during the search.

It is uncontroverted that the search warrant was issued by a Municipal Court Judge in the City of Helena, but the warrant was to be executed outside of the city limits at the West Helena Airport. (R.T. May 4, at 47). As a federal search was involved, Rule 41, supra, applies and the warrant was therefore invalid, since it was issued by a judge without authority to issue it. Rule 41(a), supra, clearly states that only "a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located" may issue a search warrant. The airport and hangar are outside of the City of Helena and

therefore outside of the district over which the issuing City Court Judge had jurisdiction. See, e.g., Application of Houlihan, 31 F.R.D. 145 (D.ND 1962), wherein the District Court ruled that under Rule 41, a search warrant issued by a County Court Judge could only be executed in that county. The contrary argument raised in the government's brief to the Appellate Court below was based on an Arkansas statute governing authority of local courts to issue search warrants; as indicated above, this statute is preempted by the federal rule which sets forth its own jurisdictional requirements.

The warrant being invalid as having been issued by a judge without authority to do so, any evidence produced by the search should have been suppressed. The federal courts have held that issuance of a search warrant under these conditions constitutes such fundamental noncompliance with federal procedure so as to require invocation of the

exclusionary rule. United States v. Radlick, supra, Navarro v. United States, supra. As the Court noted in Radlick, supra:

> "[t]he federal rules are designed as standards for federal officers and it is the obligation of the officers to obey them, but that 'policy is defeated if the federal agent can flout them.'" 581 F.2d at 228, quoting Rea v. United States, 350 U.S. 214. 217-218 (1956).

The courts below improperly ruled that the judge in Helena had authority to issue the warrant, and the failure to suppress the evidence uncovered pursuant to the invalid search warrant was therefore erroneous.

This case is particularly appropriate for review by this Court, as some circuits have utilized a type of "good faith" exception to the exclusionary rule in Rule 41 cases. Under Judge Friendly's analysis in United States v. Burke, supra, some courts will not exclude evidence wrongfully procured

> "unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate

disregard of a provision in the rule." 517 F.2d at 386-387.

Other courts, however, follow the Fifth Circuit rule in Navarro, supra, which does not consider any such exceptions.

2. The Search Warrant was Based on an Insufficient Affidavit

An affidavit in support of an application for a search warrant must provide a basis for a magistrate's determination that there was probable cause to believe that the items being sought would be found at the location named by the affiant. Illinois v. Gates, _____ U.S. _____ (1983). Probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of reasonable caution to believe that the items to be seized would be found in a stated place. Brinegar v. United States, 338 U.S. 160 (1949), United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970). It does not follow simply from the existence of probable cause to believe a suspect guilty of a crime that

there is also probable cause to search premises in which he has an expectation of privacy. United States v. Lucarz, supra.

Putting off for a moment the hearsay problems caused by reliance of the affiant on information received from informants, it can be seen even at this point that the afidavit in support of the search warrant procured at Helena was deficient in light of the principles stated above. This affidavit contains absolutely no facts which would lead one to believe that illegal drugs or the missing seats were in the hangar. Agent Lawrence merely stated that the petitioner had been arrested on suspicion of a narcotics violation involving transportation of narcotics in a plane which was believed to have briefly touched down at the West Helena Airport. The affidavit does not state that any drugs had been deposited at West Helena, and in fact it sets forth that the suspect plane took off "immediately" after landing at the airport there. These facts are

insufficient to cause a reasonable man to believe that drugs or the missing seats were located in a hangar at the airport. (Affidavit, C.R. 40).

There is additional information contained in the affidavit which is not the product of direct observations made by Agent Lawrence or any other law enforcement officials, namely allegations that the aircraft had previously been stored in the hangar which was searched and that the petitioner had previously been seen at the hangar. While these statements are at best a product of hearsay information and do not pass constitutional muster under any tests so far progmulgated by this court (see discussion below), even if they were sufficiently trustworthy for purposes of procuring a search warrant, they still provide no factual basis upon which the affiant could make his conclusory statement that he "had reason to believe" that drugs and the seats were in the hangar, or that the

suspect airplane was "apparently" headed toward the hangar at the time it landed at West Helena, or that his "investigation" revealed that the aircraft had been stored in the hangar on previous occasions. Merely conclusory statements unsupported by facts do not constitute valid information upon which a magistrate can determine probable cause, and an affiant must support his conclusions with some basis in fact. Illinois v. Gates, supra.

Agent Lawrence's belief that the drugs and seats were inside the hangar is unsupported by other facts stated in the affidavit. In fact, no facts set forth in the affidavit support Agent Lawrence's assertion that the plane had ever previously been at the West Helena Airport. Nowhere is it indicated what facts were discovered during his "investigation" which led him to such a belief, and therefore a magistrate would have no basis for evaluating the validity of such a statement. Whether

underlying circumstances existed which supported Agent Lawrence's beliefs is irrelevant, since the affidavit stands or falls on its face based on what is contained within its four corners. Illinois v. Gates, supra. In sum, the affidavit did not provide the magistrate with a sufficient factual basis upon which to reasonably believe that the drugs or seats were in the hangar, even if the hearsay information were not excluded.

The affidavit is rendered all the more insufficient by virtue of the inclusion of hearsay information which was supplied by an informant or informants and which could not be adequately verified. The facts set forth in the affidavit which are a product of such hearsay involve the previous sightings of the petitioner around the hangar which provides the only link between the petitioner and the hangar which is set forth with any basis at all in the affidavit. Agent Lawrence's affidavit indicates only that petitioner had "been identified by eye

witnesses in my investigation" as having been at the hangar, and that his "beliefs" were "substantiated by my conversations with personnel at the airport."

The problems arising whenever hearsay from informants is relied upon in a search affidavit have been discussed at length by this Court. See, e.g., Illinois v. Gates, supra. In Gates, this Court reactivated a type of common sense "totality of circumstances" test for determining when such hearsay may be found reliable enough to be considered in a probable cause determination pursuant to a search affidavit and rejected the more rigid "two prong" test of Aguilar v. Texas , 378 U.S. 108 (1964). This Court declared that test had been applied too mechanically and without due regard to the fact that there are many ways to evaluate the trustworthyness of hearsay from informants. Thus, in Gates, the reliability of the hearsay was held to be sufficiently verifiable despite the lack of showing of the

underlying "basis of knowledge" of the informant; i.e., how the informant learned of his information. This ruling was based on the fact that the information provided by the informant was detailed enough so that the accuracy of many of the particulars could be and were verified by the police before going to the magistrate, thereby suggesting the reliability of the informant and his information.

Other cases involving appellate court approval of informant hearsay bearing indicia of reliability are cited in Gates, but all involve a showing of a "substantial basis" for believing that the hearsay was somehow reliable or trustworthy. This is in marked contrast to the affidavit herein. The "eye witnesses" are nowhere identified in the affidavit nor is any indication provided that these "eye witnesses" had ever provided accurate information in the past. It is clear that no actual "eye witnesses" were involved since no crime or contraband was

actually seen by anyone. In addition, at least one of the "eye witnesses" turned out to be an informant. This informant had phoned the local police to tell them that he recognized the petitioner in a news report on television and that he had seen the petitioner at the hangar on previous occasions. Such informant hearsay is clearly subject to the requirements discussed in Gates, supra, yet the affidavit presents no facts which would allow any independent verification of the accuracy of this or any other statement in the affidavit indicating that the petitioner had previously been seen at the hangar.

Since the affidavit is comprised of conclusory statements of the affiant without any factual basis appearing in support thereof, and the statements of the "eye witness" informants are unverifiable on the face of the affidavit, the search warrant thereby procured is invalid and the fruits of the search warrant thereby procured is

invalid and the fruits of the search should have been suppressed under Mapp v. Ohio, 367 U.S. 643 (1961).

CONCLUSION

For the reasons delineated above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

RESPECTFULLY SUBMITTED this 3rd day of June, 1983.

McGRODER, PEARLSTEIN,
PEPPLER & TRYON, P.C.

By _____
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

JAMES BLAIR PORTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

AFFIDAVIT OF SERVICE

MICHAEL TRYON, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 28(3), Supreme Court Rules, he has served three (3) copies of the following documents on the United States Attorney for the Western District of Tennessee, Memphis, Tennessee, and has forwarded by mail, three copies of the same to the Solicitor General, Department of Justice, Washington, D.C., 20530, on the 21 day of June, 1983:

(1) Petition for Writ of Certiorari to the Supreme Court of the United tates;

(2) Affidavit of Service.

Michael Tryon

SUBSCRIBED AND SWORN to before me this 30 day of June, 1983.

Notary Public

My Commission Expires:

My Commission Expires Oct. 23, 1984

Nos. 81-5617-18, 81-5648

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES BLAIR PORTER, JR., JOHN MATTHEWS (alias KENNETH WAYNE TAYLOR), and GARY DENNIS BRICKEY,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee

Decided and Filed March 10, 1983

Before: MARTIN, Circuit Judge, PHILLIPS and BROWN, Senior Circuit Judges.

PHILLIPS, Senior Circuit Judge. James Blair Porter, Jr., John Matthews (alias Kenneth Wayne Taylor) and Gary Dennis Brickey appeal their jury convictions for conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846, and conspiracy to import a controlled substance into the customs territory of the United States in violation of 21 U.S.C. § 963. They raise numerous claims of trial error involving the failure to allow discovery, the failure to suppress evidence and the allowance of allegedly prejudicial com-

ments by the prosecutor concerning the defendants' silence at the trial. Appellant Brickey also asserts certain individual arguments on appeal. We hold that these claims are without merit and affirm the convictions of all appellants.

I

Appellants Porter and Matthews (alias Taylor) raise three main contentions on appeal, which are also adopted by appellant Brickey. First, they argue that their fifth and sixth amendment rights were violated by the refusal of the District Judge to allow their counsel and experts to board a United States Customs plane to examine radar and infrared electronics and surveillance equipment used to intercept, track and observe the aircraft which brought the controlled substance involved in this case into the United States. Second, they argue that the prosecutor at the trial violated their fifth amendment right against self-incrimination by improperly commenting on their failures to testify. Finally, they challenge the validity and execution of the warrant authorizing the search of an airplane hanger at the West Helena Airport in Forrest City, Arkansas.

In addition to these contentions, Brickey makes individual arguments. He alleges that the District Judge erred in holding that his arrest and detention were supported by probable cause, in denying his motion that the District Judge recuse himself for prejudice, in denying his motion to sever the trials and in denying his motion for a directed verdict.

II

On January 26, 1981, at approximately 10 p.m., United States Customs officials in a Cessna Jet sighted an aircraft flying at low altitude and without lights over international waters off the coast of Florida. The sighting was made with the aid of a highly sophisticated air-to-air radar system and forward looking infrared radar (FLIR) located on the spe-

cially equipped Customs plane. The infrared equipment enabled the Customs officials to identify the suspicious aircraft as a low wing, twin engine plane.[1]

Using this surveillance equipment, the Customs plane tracked the suspect aircraft into United States air space, at which time the plane climbed to a normal altitude and turned on its navigation lights. At this point, a second group of Customs officials flying in a Beechcraft King Air Customs plane made a visual sighting of the suspect plane, and noted that its tail light was unusually bright. With the help of other Customs planes, not specially equipped, the Cessna Customs Jet followed the suspect aircraft northward over Florida and then westward over Georgia, Alabama and Mississippi. The tracking of this plane was continuous except for one brief period over Alabama when de-icing equipment on the Cessna Jet was utilized, causing the aircraft power system momentarily to cut off the surveillance equipment. When the equipment was reactivated, it locked onto the target reasonably assumed to be the suspect aircraft since the plane was continuing in the same northwesterly course at the same speed and altitude.

Near Holly Springs, Mississippi, the suspect aircraft gradually dropped off the radar screen as if it were making a landing approach. The Holly Springs police were alerted and two officers proceeded to the Holly Springs Airport, arriving sometime after 2:20 a.m. on the morning of January 27. Upon their arrival they observed a twin engine plane taking off and heading in a westward direction, after having apparently

[1] Testimony at the pre-trial hearing and at the trial revealed that the FLIR system allows a person to see particular objects in the dark by picking up the heat emitted from those objects and transposing the image of the object through a camera-like device onto a screen, similar to that on a black and white television set. The system allows one to make a generic identification of the object. For example, the operator is able to distinguish between people and other objects, or a Cessna Citation and a DC-3, but not between two different DC-3's.

been refueled from a pickup truck at the airport. The pickup truck was observed parked in an airport area that normally is locked and closed during night hours. The police searched the inside of the truck and found bolt cutters, suitcases, fuel tanks, aircraft radio equipment, flight logs, and manila folders labeled "N73DE." In the meantime, the sheriff's department had been alerted and a deputy sheriff arrived at the airport shortly after the Holly Springs Police. He testified that a search of the area was carried out, revealing that the lock at the airport entrance had been cut.

Sometime after the suspect aircraft left the Holly Springs area, the Memphis Area Control Center notified Customs that a possible target had been picked up headed toward Helena, Arkansas. The Beechcraft King Air Customs plane, not specially equipped, was vectored to this target and followed it to the West Helena Airport. The pilot of the Customs plane was able to make a visual identification of the suspect aircraft as a twin engine Piper Navajo, with a bright tail light similar to the one he had noticed on the plane that entered U.S. air space from off the coast of Florida. The Customs plane proceeded to land at the West Helena Airport behind the suspect aircraft, and tried to block its departure. The aircraft managed to escape, however, narrowly avoiding a collision with the Customs plane. While the planes were on the ground, the Customs official was able to see the aircraft's pilot and its identification number. He identified the pilot as appellant Porter, and the plane's number as N76DE.

By the time the Navajo aircraft was airborn again, the specially equipped Cessna Customs plane had arrived and "locked on" its radar to the suspect plane. The aircraft was followed by Customs officials until it landed again at the Forrest City Airport in Arkansas. With the aid of the FLIR system, the Piper Navajo aircraft was observed to come to a stop, two persons were seen to emerge for a short time, an object was observed to be left near the runway, and the plane then immediately took off again. Shortly thereafter, a

50 pound bundle of marijuana was picked up near the runway by local police.

The suspect plane then proceeded to the Arlington Airport in Tennessee, where it landed again. The plane observed to land was the same Piper Navajo aircraft, with identification number N761DE, that the Customs officials previously had identified. This time government planes prevented another departure, and appellants Porter and Matthews (alias Taylor) were arrested while they were trying to hide in the immediate area. A search of the plane revealed a small amount of marijuana debris found in the passenger area, from which all the seats had been removed.

The deputy sheriff testified that, meanwhile, after it became light at the Holly Springs Airport on January 27, a more comprehensive search of the area around the pickup truck was carried out. A piece of torn blue cloth was found on a barbed wire fence reasonably near the truck. Down feathers were also found by this spot in the fence, and leading through a field for about a mile. The deputy further testified that later that morning, after he had left the airport, he received a report that a man wearing a blue coat was seen going down toward some railroad tracks about two or three miles from the airport. The railroad tracks were located in the same direction the down feathers were leading.

The deputy sheriff went to the described area, where he saw a man attempting to hide. He then arrested the man, who turned out to be appellant, Brickey. Brickey was wearing a blue goose down jacket that had been torn. According to the deputy, the arrest was made at 8 a.m. on January 27. It was made without a warrant. During a search of Brickey's person $600 was found, along with his papers and other identification. Furthermore, after being incarcerated, Brickey made some reference to some tape or tapes located in the camper truck as being in his truck.

On January 28, local police in West Helena obtained a search warrant for a hanger at the West Helena airport, where

they discovered the missing Navajo airplane seats and marijuana residue. A government witness testified at trial that he had leased a Piper Navajo, No. N76DE, to a "John Peters", whom he identified as appellant Porter. He also testified that he "leased" the hanger to Porter in the sense that he allowed Porter to use the hanger occasionally if needed, but that Porter was given no control over it.

Porter, Matthews (alias Taylor) and Brickey subsequently were indicted on the two counts previously mentioned. Prior to trial, several motions to suppress evidence were made by the defendants involving, among other things, the evidence obtained as a result of the search of the hanger at the West Helena Airport, and that obtained as a result of Brickey's arrest. A suppression hearing was held and all motions were overruled. The defendants made several attempts to obtain discovery of the Customs surveillance equipment, including a motion for a continuance for that purpose. These motions, along with the pretrial motions made by Brickey, also were denied and the case proceeded to trial.

III

The major issue in this appeal is whether the constitutional rights of appellants were violated by the refusal of the District Judge to allow their counsel and experts to examine the classified surveillance equipment aboard the U.S. Customs plane. The decision of the District Judge not to allow discovery was based on his conclusion that the defendants had not met the materiality standard of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Appellants claim that this refusal denied them their fifth amendment right to a fair trial and their sixth amendment right to confront effectively the witnesses against them. They argue that the law requires the government either to allow discovery of the classified information or to dismiss the charges against them. *See United States* v. *Andolschek*, 142

F.2d 503 (2d Cir. 1944); *Attorney General of the United States v. Irish People, Inc.*, 502 F.Supp. 63 (D.D.C. 1980, rev'd 684 F.2d 928 (D.C. Cir. 1982)).

Fed. R. Crim. P. 16(a)(1)(C) provides for liberal discovery by defendants in criminal cases. However, we conclude that this rule does not require reversal of the district court under the facts and circumstances of the present case. The ultimate question is whether the denial of discovery deprived defendants of a fair trial.

Section 4 of the Classified Information Procedures Act, 18 U.S.C. App. § 4 (1976 & Supp. V 1981), 94 Stat. 2025, authorizes the district court to delete classified material from the information made available to defendants. Section 6(e)(2) of the Act further provides as follows:

> (2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information, except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. 18 U.S.C. App. § 6(e)(2) (1976 & Supp. V 1981).

It is to be emphasized that this statute by its terms does not require dismissal of the indictment in every case where a defendant is denied access to classified equipment or information. The district court is authorized to refuse to dismiss the indictment "when the court determines that the interests of justice would not be served by dismissal." We conclude that the district court did not abuse its discretion in failing to dismiss the indictment under the facts and circumstances of this case.

Viewing the record as a whole, we conclude that even if the defendants may have been hampered to some degree by inability to inspect the surveillance equipment in their defense

against the charge of the conspiracy to import a controlled substance, they were not deprived of a fair trial. Nor did the denial of discovery taint the trial as a whole to the extent that it rose to the level of a constitutional deprivation.

First, this is not a case where defendants were disallowed all access to discovery of the classified information in question. At the pretrial hearings on defense motions, the defendants were allowed extensive cross examination of the pilot and the Customs surveillance operator who were aboard the specially equipped Customs plane. Testimony revealed that the air-to-air radar was the same system used in the F-16 Fighter produced by Westinghouse. The infrared system was also described in detail, including testimony concerning its operation, its range, and its ability to distinguish between various objects observed. The defendants offered no expert testimony challenging the capabilities of the surveillance systems relied upon in this case.

Second, a review of the record reveals that there was substantial independent evidence verifying and corroborating the information obtained by the surveillance equipment, and supporting the verdicts of the jury. The essential characteristics of the suspect aircraft were corroborated by the eyewitness testimony of the pilot of the Beechcraft King Air Customs plane, who also correctly identified the plane's identification number and its pilot. The landing and departure of the plane at Holly Springs were borne out by the Holly Springs Police and the presence of the pickup truck containing fuel tanks, aircraft radio equipment, flight logs and folders bearing the identification number of the plane in question. The fact that an object was left behind near the airport runway after the aircraft departed from the Forrest City Airport was clearly corroborated when local police subsequently found a fifty pound bundle of marijuana there. The location of the fleeing suspects at the Arlington Airport in Tennessee was borne out by their capture. The search of the Piper Navajo aircraft, revealing the marijuana debris, supports the conclusion that this was the plane that the Customs officials had

been tracking, and supports the verdicts against the three defendants.

Defendants cite *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978), where the Ninth Circuit Court of Appeals held that the testimony of an officer relying on the FLIR system to make a unique identification of the defendant's aircraft as the same aircraft that landed on a lake bed was inadmissible because the FLIR is not a generally accepted technique for such a precise identification. The court added, however, the FLIR is a perfectly acceptable method for the generic identification of objects, and can be used readily to distinguish between plane and boat or even between a Lear jet and DC-3. *Id.* at 508. In the present case, there was no attempt to make a specific identification of the suspect aircraft in question. The surveillance equipment was used simply to identify the plane as a low wing, twin engine aircraft. Eyewitness testimony was used for the identification of the occupants of the plane and its number.

The district court made the following finding in support of its decision to deny a continuance for inspection of Cessna Jet plane and its equipment:

> Defendants have raised at an early stage, and throughout the trial, objection that the Court did not require the government to permit the defendants, their counsel and experts to examine the plane and the equipment which was designated as secret by the Customs Service. The Court does not believe that this ruling effectively prevented the assistance of counsel in this case or limited a reasonable right of cross-examination under the Sixth Amendment.
>
> • • •
>
> It is appropriate to note that information obtained from the U. S. Customs' "magical instruments" (as characterized by one of the defendants' counsel), was verified and corroborated from time to time as accurate and correct during the course of the tracking, chase and

eventual seizure of the Piper Navajo and its suspected occupants. The essential characteristics of the plane, except for color and identification number, proved to be correctly shown; the landing and departure at Holly Springs were borne out by other objective and eyewitness evidence; the dropping of a bundle of marijuana was established by later visual contact, and the location of the apparently fleeing suspects at or near the Arlington airport was also corroborated. This is sufficient to overcome an unfounded defendant contention that the radar and infrared devices could really not perform as competent and qualified witnesses testified that they did.

We find no constitutional violation in the failure of the district court to dismiss the indictment and its denial of discovery of the aircraft and equipment.

IV

Appellants also argue that the prosecutor violated their fifth amendment rights by improperly commenting on their election not to testify at trial. Two particular statements made by the prosecutor are objected to on appeal. First, the prosecutor made the following comment in discussing Brickey's presence at Holly Springs, Mississippi:

> "Mr. Taylor ran from that . . . I mean, Mr. Brickey ran from that truck, hit a barbed wire fence. He ripped his coat, some of that coat on the barbed wire fence, left a trail of down leading from that fence, apprehended about three hours later in the same direction, about three miles from the Holly Springs airport wearing the exact same jacket, trailing the exact same down, soaking wet, no reason why he is there from Florida, no visible means of transportation, and there he is in Holly Springs, Mississippi."

Second, the prosecutor commented on the failure of defense counsels' proof as follows:

> "Why do we bring all these folks in? And we listen to the defense attorneys and they talk about the fact that the proof is going to show there were two aircraft, and proof is going to show this is all a big mistake. Mr. Porter and Mr. Taylor should never have been arrested. We sit here and it is obvious that is not the case.
>
> "Why, why do we sit here? We have been made these promises by the defense attorneys and we get ready for their proof and we are all on the edge of our seats and we are thinking, here it comes, government, here we are going to show you, and they call their witness and out comes an escaped prisoner that has been in jail off and on since 1969 to say that the Sheriff told him there was some tape in the truck, not that he unloaded it or not that the truck, as it has been implied, that that is it. This is the defense proof. A stipulation that the aircraft carried so many volts and lights were so many candle power. Why are we here?

Although the District Judge expressed some concern about the comments of the prosecutor, he concluded that they presented no constitutional violation. He instructed the jury that no inference was to be drawn from the silence of defendants.

In *Griffin* v. *California*, 380 U.S. 609 (1965), the Supreme Court recognized that a prosecutor may not comment on the failure of a defendant to testify. It is not error, however, for a prosecutor to comment on the failure of the defense to produce certain evidence. *United States* v. *Bright*, 630 F.2d 804 (5th Cir. 1980). The standard in this Circuit under which comments of a prosecutor are to be judged was set forth in *United States* v. *Robinson*, 651 F.2d 1188, 1197 (6th Cir.), *cert. denied*, 454 U.S. 874 (1981), as follows:

> To reverse a conviction for improper comment on the criminal defendant's Fifth Amendment right to remain silent, "we must find one of two things: that 'the prosecutor's' manifest intention was to comment upon the accused's failure to testify or that the remark was 'of such

a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *United States* v. *Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977); *United States* v. *Wells*, 431 F.2d 434, 435 (6th Cir. 1970), *cert. denied*, 400 U.S. 997, 91 S.Ct. 475, 27 L.Ed.2d 448 (1971).

Based on our examination of the record, we conclude that the prosecutor's comments in the present case did not meet the *Robinson* requirements for reversal under the fifth amendment.

V

Appellants assert various fourth amendment arguments challenging the validity of the issuance and execution of the warrant to search the hanger at the West Helena airfield. We hold, however, that the defendants had no expectation of privacy in the hanger, and, therefore, had no fourth amendment interest at stake. *See Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *United States* v. *Barry*, 673 F.2d 912, 917 (6th Cir. 1982). Appellants Matthews (alias Taylor) and Brickey clearly have no privacy interest in the hanger. The record reveals that they had no possessory interest therein, nor any right to expect items located there to be secure within the meaning of the fourth amendment.

Appellant Porter asserts that he had a privacy interest as a permissive user of the hanger, and because he placed a lock on the hanger entrance. The owner of the hanger testified, however, that while he allowed Porter to use the hanger occasionally, Porter was given no control over it. The record also reveals that Porter knew his property was not the only property being stored in the hanger. The hanger owner had several items of personal property stored there.

We also conclude that the appellants' *Aguilar* and *Spinelli* arguments are without merit. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

VI

The most significant of Brickey's contentions is his argument that he was arrested without probable cause, in violation of the fourth amendment. He also contends that the arrest violated Mississippi statutory law. Section 99-3-7 of the Mississippi Code Annotated provides:

> An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it, or on a charge made upon reasonable cause, of the commission of a felony by the parties proposed to be arrested. And in all cases of arrest without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit. Miss. Code Ann. § 99-3-7 (1972)

In the present case it is undisputed that the officer who arrested Brickey did not inform him of the object and cause of his arrest. We hold that the question whether Brickey's arrest was legal for purposes of this proceeding in federal court is controlled by federal standards. The central question is not whether there was a technical violation of a Mississippi statute, but whether there was probable cause for the arrest. *See Upshaw* v. *State*, 350 So.2d 1358 1363 (Miss. 1977) (holding that even though § 99-3-7 of the Mississippi Code was not complied with, because the arresting officer failed to inform the accused of the object and cause of his warrantless arrest, the arrest was still valid because the State met its burden of proving probable cause for the arrest).

As a general rule, a defendant can be arrested without a warrant only if probable cause to arrest exists at the time of

the arrest. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States v. Calandrella*, 605 F.2d 236, 246 (6th Cir.), *cert. denied, Sub nom*, 444 U.S. 991 (1979). The burden of showing probable cause to make a warrantless arrest is on the government. *United States v. Perez-Castro*, 606 F.2d 251, 253 (9th Cir. 1979).

Whether the Government and local officials had probable cause to arrest Brickey depends on whether the down feathers and torn fabric on the airport fence were found before or after the arrest. Brickey claims they were not found until after his arrest, and that the only basis for his arrest was information received concerning a man "going down to the railroad wearing a blue coat" approximately three miles from the Holly Springs Airport. Brickey's argument is based on the testimony of an agent of the Mississippi Bureau of Narcotics, who said that the Bureau made its investigation of the airport area, finding the goose down and torn cloth, hours after Brickey already had been arrested and taken into custody.

Further examination of the record indicates that the discovery of the incriminating items in question was made prior to Brickey's arrest. Although Mississippi Narcotics agents seem to have made a search of the airport after the arrest, the arrest was not made by them. The arrest was made by the local deputy sheriff, and the record indicates that he found the items in question during a search of the area made before the arrest. The deputy sheriff testified that he arrived at the Holly Springs Airport between 2:00 and 3:00 a.m. on the morning of January 27. He said that after daybreak he and another deputy looked around the area and found the torn portion of a blue coat and the down feathers. He then testified that it was "[l]ater that morning, after we left the airport" that he received the information concerning a man with a blue coat going down toward the railroad and proceeded to arrest Brickey.

In addition to the deputy's knowledge of the torn piece of blue fabric and the down feathers, the evidence leading to the arrest included the discovery of the pickup truck with the aircraft equipment inside, and the report that an unidentified man was walking toward a railroad track near the airport. Furthermore, Brickey was found on or beside the railroad tracks, which were only two or three miles from the airport and were in the same general direction as the trail of down feathers leading away from the airport. We conclude that this evidence, which was known prior to the arrest, establishes probable cause for Brickey's arrest. All of the evidence gained from the arrest was properly admitted.

Brickey also argues that the District Judge erred in denying his motion that the District Judge recuse himself for prejudice. The sole basis for this argument was a statement made by the District Judge during preliminary motions that the three defendants were "apparently caught redhanded." There is no claim that the District Judge had any prior dealings with the appellants, or that he had any preconceived prejudice against them. We hold that Brickey's claim is without merit. Impressions based on information gained in the proceedings are not grounds for disqualification in the absence of pervasive bias. *Whitehurst* v. *Wright*, 592 F.2d 838 (5th Cir. 1979); *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

Likewise, we find no merit in Brickey's claim of error concerning the denial by the District Judge of his motion to sever the trials. The granting or denial of a severance is within the sound discretion of the trial court. *United States* v. *Goble*, 512 F.2d 458, 466 (6th Cir.), *cert. denied*, 423 U.S. 914 (1975). In the present case the District Judge determined that there were not so many defendants involved that the jury would be confused, or unable to determine the merits of the charges as to each defendant individually. After reviewing the record we hold that the District Judge clearly

did not abuse his discretion in reaching this conclusion.

Finally, for the reasons expressed in this opinion we hold that the District Judge did not err in denying Brickey's motion for a directed verdict of acquittal.

Attached hereto as an appendix are letters from the Assistant United States Attorney and the attorney for Matthews alias Taylor relating to the identity of appellant Matthews alias Taylor.

Affirmed.

APPENDIX

[LETTERHEAD OF UNITED STATES ATTORNEY, WESTERN DISTRICT OF TENNESSEE]

[Dated 31 January 1983]

[Filed February 2, 1983]

Mr. John P. Hehman, Clerk
U. S. Court of Appeals
Sixth Circuit
U. S. Post Office & Courthouse Bldg.
Cincinnati, Ohio 45202

Re: United States of America
v.
James Blair Porter, Jr.,
Kenneth Wayne Taylor, and
Gary Dennis Brickey
81-5618; 81-5617, and 81-5648

Dear Mr. Hehman:

A situation has arisen in the above-captioned cases which I feel should be brought to the attention of your office and the court.

On December 8, 1982, this case was presented for oral argument and argued in the United States Court of Appeals for the Sixth Circuit. As yet a decision has not been issued in the case.

Approximately one week ago the person who was known to us as Kenneth Wayne Taylor, one of the defendants in this case, became a fugitive, and a warrant was issued for his arrest. This warrant caused an investigation to be done concerning the whereabouts of Mr. Taylor; and at that time it was determined that Kenneth Wayne Taylor lived in the area of Fort Worth, Texas. Upon investigation by the Marshal Serv-

ver, it became apparent that Kenneth Wayne Taylor of Fort Worth, Texas, who had an identical background to that given by the Kenneth Wayne Taylor in this case, was not the defendant who was arrested, tried, and appealed his conviction in the present case. Further investigation has revealed that the person whom this court knew as Kenneth Wayne Taylor is in fact an individual by the name of John Matthews, a previously convicted drug smuggler, whose whereabouts are unknown. Upon checking with the Probation Officer, who did the pre-sentence report, it has been determined that Mr. Matthews completely assumed the identity of Kenneth Wayne Taylor, and supplied background information, records, and other relevant material both to the trial court and to the Probation Officer who was conducting the pre-sentence report.

Because this is a somewhat bizarre situation, i.e., a person assuming another identity and being able to slip through the entire judicial and prosecutorial system before his true identity becomes known, I felt that this situation ought to be brought to the attention of the court. Thank you.

Very truly yours,

W. HICKMAN EWING, JR.
United States Attorney

By /s/ TIMOTHY B. DiSCENZA
Timothy B. DiScenza
Assistant United States Attorney

TBD/mjl

cc: Mr. Wayne Emmons
Attorney for Kenneth Wayne Taylor
Suite 932, 333 Griffin Square
Dallas, Texas 75202

[LETTERHEAD OF WAYNE EMMONS, LAWYER]

[Dated February 23, 1983]

[Filed February 28, 1983]

Mr. John P. Hehman, Clerk
United States Court of Appeals
Sixth Circuit
United States Post Office and
Courthouse Building
Cincinnati, Ohio 45202

RE: Case No. 81-5618, United States of America v. Kenneth Wayne Taylor.

Dear Mr. Hehman:

Thank you for your letter of February 2, 1983. I apologize for my delay in responding, but I was out of my office February 10-20 and did not see your letter until my return.

I was aware of the matters that have arisen since oral argument regarding the identity of my client, Mr. Kenneth Wayne Taylor. I appeared with Mr. DiScenza, the Assistant United States Attorney, before Judge Odell Horton sometime early in January at which time the government moved for a revocation of my client's appeal bond based on the allegation that he had not reported to the U.S. Marshal every Friday as required by Judge Wellford. At that time I tried to locate my client, but could not and the motion was granted and Mr. DiScenza reported to the Court at that time the suspicions of the government regarding my client's identity. That was all I knew of the matter until I received a copy of Mr. DiScenza's letter of January 31, 1983.

It perhaps goes without saying, but nevertheless I should say for the record that I have absolutely no knowledge of any fraud on the Court. My client, from my first contact with him, represented himself as Kenneth Wayne Taylor and has

up until I last talked with him sometime prior to oral arguments.

As an officer of the Court I should also state that, other than stated above, I have nothing to controvert the allegations of the government, as "bizarre" as they are.

Having never faced this situation before nor knowing of anyone who has faced it, I assume my duty is to continue to represent my client, be he Kenneth Wayne Taylor, Matthews, or whomever, until appeals have been exhausted or relief granted. If the Court has any thoughts contra, I assume I shall hear.

Very truly yours,

/s/ WAYNE EMMONS
Wayne Emmons

WE: ps

Nos. 81-5617-18, 81-5648

FILED

MAY - 3 1983

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES BLAIR PORTER, JR., JOHN MATTHEWS (Alias Kenneth Wayne Taylor) and GARY DENNIS BRICKEY, Defendants-Appellants.	ORDER DENYING BOTH PETITIONS FOR REHEARING AND THE PETITION FOR REHEARING EN BANC.

Before MARTIN, Circuit Judge, and PHILLIPS and BROWN, Senior Circuit Judges.

James Blair Porter and John Matthews (alias Kenneth Wayne Taylor) have filed a petition for rehearing en banc. The majority of the active judges of this court have not voted in favor of en banc rehearing. This petition for rehearing has been referred to the hearing panel for consideration, together with the petition for rehearing filed by Gary Dennis Brickey.

Upon consideration, the court concludes that both petitions for rehearing are without merit. Accordingly, it is ORDERED that both petitions for rehearing be and hereby are denied.

Entered by order of the court.

John P. Hehman
CLERK